



COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

DEVAL L. PATRICK
Governor

TIMOTHY P. MURRAY
Lieutenant Governor

IAN A. BOWLES
Secretary

LAURIE BURT
Commissioner

December 11, 2007

In the Matter of

Whitney Farm, LLC

Docket No. 2007-139

File No. W05-0564
Sherborn

RECOMMENDED FINAL DECISION

This matter involves the appeal by the Town of Sherborn of a groundwater discharge permit issued by the Department for a private sewage treatment facility that will serve a proposed c. 40B subdivision in Sherborn. The basis of the claim is that Department erred in the application of the private sewage treatment facility policy ("PSTF Policy") to the permit when it included riverfront area, isolated land subject to flooding and a tennis court within the area that counted toward the PSTF Policy's proviso that a minimum of 50% of the site will be preserved as open space.

The Department and the permittee filed Motions to Dismiss for lack of standing arguing that the petitioner did not have aggrieved party standing as required under the applicable regulation, 314 CMR 2.08. The petitioner filed an Opposition countering that it had standing in its own right and as a representative of its present citizens and future residents of the subdivision.



For the reasons set forth below, I recommend that the motions to dismiss be granted and the appeal dismissed.

In order for a petitioner to have standing to appeal under 314 CMR 2.08, it must show (a) the interest that it seeks to protect is within the zone of interests protected by the statute or regulation in question and (b) that it may be “substantially and specifically affected by the underlying adjudicatory proceeding”. Matter of Town of Plymouth, Docket No. 00-091, Ruling on Department’s Motion to Clarify Standing and Dismiss for Lack of Standing, (August 9, 2001); Matter of Northland Residential Corp., Docket No. 2003-138, Motion on Rulings (April 26, 2004). Demonstrating a substantial and specific affect requires a “concrete injury” that has a “nexus” to the subject matter of the permit and the governing statute and regulations. Matter of Plymouth, *supra*; City of Marlboro Easterly Wastewater Treatment Facility, Docket Nos. 05-193, 194, Ruling on Motion to Intervene (February 3, 2006). It is this second burden, in particular, that the petitioner has failed to carry¹.

The petitioner argues that it has demonstrated through the actions of the Planning Board in regard to this subdivision, the enactment of by-laws and in a variety of other zoning related actions that the Town has demonstrated strong interest in protecting groundwater within its borders. While that interest is no doubt sincere, it does not equate with a showing that the matter on appeal substantially and specifically affects the Town. The sole claim of aggrievement in its Notice of Claim is that the Department issued the permit in contravention of the open space proviso in the PSTF Policy. Accepting that allegation as true for purposes of the motion², the

¹ In a footnote, the petitioner purports not to concede the Department’s authority to promulgate standing regulations. To the extent the Town is challenging the facial validity of the regulations, it is in the wrong forum. Matter of GTE Operations Support, Docket No. 49-052, Final Decision-Order of Dismissal (April 7, 1995). Matter of N&C Realty Trust, Docket No. 94- 025, Final Decision - Order of Dismissal (November 23, 1994).

² See, Matter of Town of Plymouth, *supra*.

petitioner does not claim that the permit will affect any property or resource it owns or operates. *Compare, Matter of Burnham Land Trust*, Docket Nos. 90-077/078/080, Decision on Applicant's Motion to Dismiss and for a More Definite Statement (June 6, 1991) (ownership of proximate water supply). Nor does it assert any nexus between its allegation regarding non-compliance the with the PSTF Policy's open space definition, the quality of the discharge from the facility, or its potential adverse impact on groundwater. Finally, it does not dispute the permittee's assertion that the PSTF Policy's delineation of the areas to be included within the definition of open space is intended to confirm property ownership or access rights of a permittee in the site, and is not directly related to the protection of groundwater quality. *Compare, Town of Holden v. Division of Water Pollution Control*, 6 Mass.App. Ct. 423 (1978), cited by the petitioner, wherein the Court affirmed standing in reliance on the lower court's finding that the permit "would create financial problems and health hazards" for the town.

The petitioner's alternative contention that it should be granted representative standing on behalf of future homeowners and present residents is not tenable. "Representative standing is generally limited to cases in which it is difficult or impossible for the actual rightholders to assert their claims." *Salma v. Attorney General*, 384 Mass 620, 434 N.E.2d 134, 137 (1981). The petitioner claims a need to represent future owners of units whose private wells will draw from the same aquifer that the treatment facility's discharge will allegedly impact. Far from a difficult or impossible task, future buyers have a simple and direct way to express their concern about the discharge. They won't purchase a unit. The petitioner's implicit *parens patriae* assumption that future purchasers won't be able to make an informed assessment of the risks before they become homeowners is not a grounds upon which to meet the *Salma* test.

Alternatively, the Town attempts to ground its standing on the assertion that their residents don't have the time or technical expertise to interpret the PSTF policy. The alleged adverse impact to a potential drinking water source is inapposite to disputes over public transportation decisions which the Court in Wilmington v. Department of Public Utilities, 340 Mass 432 (1960) found to be an issue towns were in the best position to litigate. In the present case, there were ample opportunities for citizens to participate in public hearings before the Planning Board and in comments on the draft discharge permit. *See, Matter of Massachusetts Highway Department*, Docket No. 96-079, Decision and Order on Motion to Dismiss for Lack of Standing (December 2, 1996) (denial of town's right to assert its resident's c. 91 interests). The large number of administrative appeals filed annually speak to the fact that abutters, aggrieved individuals and ten-citizens' groups from all over the Commonwealth find both the time and resources to file a claim when they believe their personal property interests or natural resources in their community are substantially affected by the Department's decisions. It would be a disservice to the residents of Sherborn if I concluded that they were not up to that task.

For the reasons set forth above, I recommend that the motions to dismiss be granted and the appeal dismissed.

NOTICE

This decision is a recommended final decision of the Presiding Officer. It has been transmitted to the Commissioner for her final decision in these matters. This decision is therefore not a final decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c.30A. The Commissioner's final decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this recommended final decision or any part of it, and no party shall communicate with the Commissioner's office regarding his decision unless the Commissioner, in his sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the Department of Environmental Protection. A signed copy of this document is on file at the DEP office listed on the letterhead.

Philip Weinberg
Presiding Officer